RECORD AND 1 BRIEF

No. 15-214

IN THE

Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIS COUNTY,

Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF WISCONSIN

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS ON THE MERITS

Counsel for Amicus Curiae
John Pagliaro
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111
Tel.: (617) 695-3660
Facsimile: (617) 695-3656
johnpagliaro@nelfonline.org

April 18, 2016

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INTEREST OF AMICUS CURIAE[1]

New England Legal Foundation ("NELF") is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its members and supporters include large and small businesses, law firms, individuals, and others, located primarily in New England. They believe in NELF's mission of defending individual economic rights and the rights of private property, protecting the free-enterprise system, and promoting balanced economic growth in New England and the nation as a whole. In fulfillment of its mission, NELF has filed numerous amicus briefs in this Court in a great variety of cases of interest and concern to NELF's members and supporters.

NELF believes that the rights of private property are not second-class constitutional rights. The immense expansion of regulatory law that has taken place over the past nine decades at all levels of government has adversely affected the exercise of those rights, however. Since its founding, NELF has staunchly supported property owners in their efforts to vindicate their Fifth Amendment rights against government encroachment. *See, e.g., Marvin M.*

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that no party or counsel for a party authored this brief in whole or in part and that no person or entity, other than Amicus, made any monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.3(a), Amicus also states that Respondents St. Crois County and the State of Wisconsin have filed written consents to the filing of amicus briefs in support of either or neither party, docketed March 21 and March 22, respectively. Petitioners have filed a similar consent, docketed April 6.

Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

NELF appears as an amicus in the present case because it believes that the case offers the Court an ideal opportunity to clarify a crucial part of its analysis of regulatory takings claims, and because NELF believes its views may assist the Court in arriving at a fair and just outcome. The concept of "the parcel as a whole," first announced by this Court 38 years ago, is long overdue for clarification and, above all, limitation. As the Petition illustrates, federal and state courts entertain widely divergent views about what "the parcel as a whole" concept means in practice. This lack of consensus has engendered considerable confusion in the minds of all concerned, leading some courts to expand the meaning of the "parcel as a whole" on the most tenuous grounds, thereby virtually ensuring the defeat of takings claims. This Court's rejection of the parcel as a whole rule stated in the Question Presented would be a welcome first step in putting regulatory takings jurisprudence on a fairer and surer footing.

SUMMARY OF THE ARGUMENT

Fairness and justice are the touchstones of this Court's takings jurisprudence; but they are eroded when courts excessively aggregate parcels into a supposed parcel as a whole, causing claimants to go uncompensated. It is this risk of complete undercompensation, rather than of any overcompensation, that most needs to be addressed by the Court in order to enhance the fairness and justice of takings law. In this case, the Court has an ideal opportunity to give lower courts much needed guidance on this vexed issue.

The two-factor aggregation rule applied by the Wisconsin appellate court has no basis in *Penn Central*; it is exactly the kind of overly inclusive rule that leads courts to aggregate parcels excessively. The inadequacy of the rule is shown by its failure to include unity of use as a factor, even though the latter is a much more reliable indicator of the owner's own pre-taking view of relevantly related parcels and is highly pertinent to the owner's investment-backed expectations. Moreover, in the closely related area of eminent domain law, where it is also necessary to decide whether discrete parcels should be treated as one tract for purposes of determining a compensable taking, the general view is that unity of use, not contiguity, is the preponderant factor that should be considered. Thus the rule at issue, which does not include unity of use as a factor, should be rejected as not in keeping with *Penn Central* and its progeny.

ARGUMENT

I. The Court Should Strike A Fair And Just Balance When Identifying The Denominator Of The Takings Fraction.

This Court has affirmed that "fairness and justice" are the guiding principles of its takings jurisprudence. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong*); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (same).

In *Penn Central*, the Court acknowledged that, in cases of regulatory takings, "fairness and justice" must be achieved by ad hoc factual inquiries.

> While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," . . . this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978) (quoting *Armstrong*); *id.* at 124 (Court conducts "essentially ad hoc, factual inquiries"). *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (because "concepts of 'fairness and justice' that underlie the Takings Clause, of course, are less than fully determinate," Court has "eschewed" any set formula for determining when just compensation is owed).

Nowhere are the "fairness and justice" of this ad hoc analysis more put in question than in the uncertainty revolving around the use of the "parcel as a whole" as the denominator in the so-called takings fraction.

The Court has long been aware of the crucial role played by the economic comparison represented by the takings fraction.

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the

> value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967)).

Beginning at least with *Penn Central*, the Court has been alert to the problem of *overcompensation* that might result if, as Penn Central advocated in that case, the effect of the regulation were measured by "divid[ing] a single parcel into discrete segments and attempt[ing] to determine whether rights in a particular segment have been entirely abrogated" by the regulation in question. *Penn Central*, 438 U.S. at 130. The Court obviously understood that if compensation were to be paid under such a standard, "[g]overnment hardly could go on," as Justice Holmes famously said. *Pennsylvania Coal Co. v. Mahon* 260 U.S. 393, 413 (1922). *See also* John E. Fee, *The Takings Clause as a Comparative Right*, 76 So. Cal. L. Rev. 1003, 1032 (2008) ("[T]he takings denominator issue seems to exist solely because we have not found a better way to avoid the extreme result of requiring the government to compensate for all changes in the law."); David A. Dana, *Why Do We Have the Parcel-as-a-Whole Rule?*, 39 Vt. L. Rev. 617, 620 n.19 (2015).

As the present case illustrates, however, it is rather the other extreme—that of excessively

aggregating parcels and *undercompensating* claimants—that has so far escaped the Court's scrutiny and most threatens the principles of fairness and justice underlying the Court's takings jurisprudence.

Various scholars have identified the unfairness inherent in defining the parcel as a whole in a manner that is so inclusive that it prejudices the rights of the claimant. Professor Steven J. Eagle of George Mason School of Law, one of the foremost scholars of regulatory takings, has written:

> By identifying the right that is taken with the limitation the government imposes by regulation, there will always be a complete taking. However, the same objections could be made, *mutatis mutandis*, from the landowner's perspective. Through what I have termed "conceptual agglomeration," disparate parcels would be argued to constitute the relevant parcel, for the purpose of minimizing the owner's loss.

Property Tests, Due Process and Regulatory Takings Jurisprudence, 2007 BYU L. Rev. 899, 940-41 (2007). *See also* Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 Vt. L. Rev. 549, 562 (2012).

In a similar tenor, another prominent scholar of takings law, Professor John E. Fee of Brigham Young University's J. Reuben Clark Law School, has observed, "The need for such a limitation [on an owner's ability to sever property rights into increasingly smaller units] is fully evident; what scholars often overlook, however, is

that any test must also prevent the state from defining the parcel as broadly as it wishes." *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1550 (1994). Professor Fee worries that "the denominator problem . . . seems to indicate that the more property a person owns, the less likely he or she is to be compensated for an equivalent regulatory loss." *Takings Clause as a Comparative Right*, *supra* p. 5, at 1006.

Three decades ago, the tendency of courts to unduly expand the parcel as a whole was named by one commentator "a deep pocket rule" because "holders of extensive property must suffer a greater diminution in value in order to establish a takings claim." Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 So. Cal. L. Rev. 561, 568 (1984). In other words, such owners will generally go uncompensated because they are, in effect, judged able to bear alone the costs of public benefits, a result utterly inconsistent with the principles of "fairness and justice" stated in *Armstrong* and reaffirmed subsequently several times by this Court.[2] *See supra* p. 3. "We might as well say," declares Professor Fee, "that all property owners who earn more than a certain income are not

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[2] Long before *Armstrong*, the Court said of the right to compensation that "it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893).

entitled to compensation under the Fifth Amendment so as to make it less expensive for government to regulate." *Takings Clause as a Comparative Right*, *supra* p. 5, at 1032.

This case therefore affords the Court an invaluable opportunity to clarify for lower courts *Penn Central's* use of the parcel as a whole concept, so that they may better achieve fair and just outcomes in regulatory takings cases.

II. The Court Should Reject The Categorical Rule Stated In The Question Presented.[3]

If the Court is to rebalance the scales, as Amicus urges it to do, it should reject the categorical rule contained in the Question Presented. That narrow, two-factor rule is overly inclusive and lacks a foundation in *Penn Central*, as Petitioners rightly argue. *See* Petitioners' Brief on the Merits at 16-19. The rule tends to aggregate separate parcels into a larger parcel as a whole on far too tenuous a basis to be consistent with fairness and justice, and thereby creates a serious risk of undercompensation.

Within the confines of the present case, this point may be best illustrated by comparing the rule's limited, two-factor analysis with a consideration of

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[3] Petitioners ask the Court to confirm that analysis of an alleged regulatory taking starts with a rebuttable presumption that the denominator of the takings fraction is the fee title of the individual parcel alleged to have been taken. *See* Petitioners' Brief on the Merits at 24-26. NELF joins its voice to that of Petitioners in that request. The argument Amicus sets out below is intended to demonstrate, by contrast, the inadequacy of the two-factor test employed by the Wisconsin courts.

unity of use, the factor of whose importance the Murrs sought to persuade the Wisconsin courts, unfortunately with no success.

As shown in part by the takings fraction itself, *see supra* p. 4, it is on economic injuries that regulatory takings analysis focuses. *See also Penn Central*, 438 U.S. at 124 (no set formula for determining when "economic injuries" are to be compensated; factors of "particular significance" in court's inquiry are "economic impact" and "interference with distinct investment-backed expectations"); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992). *Cf. Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1116-17 (Fed. Cir. 2015) (to leave residual, non-economic value insufficient to avoid *Lucas* taking).

Unity of use rightly recognizes the owner to be the starting point for any investigation into an economic nexus between parcels. As Frank I. Michelman suggested in the 1967 article cited in *Penn Central*, the owner's use of a parcel demonstrates the owner's own pre-taking belief about relevant property interests. *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1232-33 (1967). In addition, whether parcels owned in common are also united by use will likely say a lot about the owner's investment-backed expectations, a crucial part of a *Penn Central* analysis. *See Lost Tree Village Corp. v. United States*, 707 F.3d 1286, 1292-93 (Fed. Cir. 2013).

In contrast, mere common ownership and contiguity, the sole factors found in the purported rule applied below, are inadequate in themselves to

establish in a reliable way whether there exists a relevant use uniting separate parcels into a meaningful economic whole. We need not look any further than the present case in order to see the truth of that observation. It is undisputed that the two lots in question here were, from the start, purchased with entirely different economic uses in mind. Lot F was bought in 1960 for the Murr family's own residential use; in accordance with this intended use, a three-bedroom recreational cabin was soon thereafter built there. Three years later, Lot E, a vacant, undeveloped lot situated adjacent to Lot F, was purchased by the Murrs' parents solely for investment purposes; true to that purpose, through all the intervening years it has been kept vacant and undeveloped, in sharp contrast to the Murrs' own neighboring Lot F. Thus, the two lots have been bought, retained, and managed with entirely separate and independent economic uses in mind. A decision to aggregate them in a takings analysis solely because of their common ownership and contiguity would rest on nothing meaningful in their respective economic uses—they plainly do not function as a single economic unit nor were ever intended to do so.

Another way to convey the artificially and unfairly constrained nature of the two-factor rule is by examining a closely related area of law—eminent domain. In the law of eminent domain, unity of use is a well-established factor in the analysis of certain claims for compensation. Such claims arise when there has been a condemnation of one property and there exists a question as to whether another property, not itself physically taken, has suffered a compensable diminution of economic value as a

consequence of the condemnation. The general rule is that a claimant is entitled to just compensation for the condemned property and also for any diminution of value suffered by the other property as a result of the taking, but only if there is unity of use between the two properties such that they form one economic unit. *See* James Timothy Payne, Annotation, *Eminent Domain: Unity or Contiguity of Separate Properties Sufficient to Allow Damages for Diminished Value of Parcel Remaining After Taking of Other Parcel*, 59 A.L.R. 4th 308 § 2[a] (1988).

> As a general rule, in order to establish that lands divided in some manner are in fact a single unit for the purpose of assessment of damages due upon the condemnation of all or a portion of the land on one side of the divide, so that severance or consequential damages can be awarded for the land not actually [i.e., directly] affected by the condemnation, the party claiming that the land is a unit, whether it be the property owner or the condemnor, must show contiguity, unity of use, and unity of ownership.[4]

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[4] Amicus notes that this allocation of the burden of persuasion in eminent domain law corresponds to that suggested by Petitioners for regulatory takings cases. *See* Petitioners' Brief on the Merits at 26 (party wishing court to depart from presumed parcel as a whole either by aggregating with it other parcels or by segmenting it should bear burden of persuasion). In both situations, it is only fair and reasonable to impose that burden on the party asking the court to ignore legal distinctions that have hitherto rendered a given parcel a discrete, integral unit.

. . . .

> Although the general rule is that the land must be contiguous and there must be a unity of use between the various parcels, it becomes difficult to separate or distinguish these two issues, many courts holding lands contiguous because of a unity of use between the parcels. But more often than not, cases of this nature turn on the issue of unity of use, some courts holding that ownership by the same property owner of other lands in close proximity to the appropriated land, standing by itself, is without legal significance.

Id. In short, "as a general rule, unity of use, or integrated use, is the controlling factor, not physical contiguity." *Id.*

The Model Eminent Domain Code (1974) also recognizes the predominating importance of unitary use over mere contiguity in determining the whole of the relevant parcel. Section 1007, whose very title ("Entire Property") strongly recalls the parcel as a whole concept, sets out "the rule for determining whether two or more parcels of real property under single ownership should be treated, for purposes of determining compensation, as a single unit or as several separate parcels." Model Eminent Domain Code § 1007 cmt. That rule states, in part, "all parcels of real property, ***whether contiguous or noncontiguous***, that are in substantially identical ownership and are being used, or are reasonably suitable and available for use in the reasonably foreseeable future, for their highest and best use *as*

an integrated economic unit, shall be treated as if the entire property constitutes a single parcel." § 1007 (emphasis added). *See also* 26 Am. Jur. 2d *Eminent Domain* § 290 (Westlaw 2016) ("single integrated use" key factor).

As the Model Code's expression "an integrated economic unit" suggests, unity of use should mean considerably more than, in some general sense, the same use, or the same kind of use, or a common use. The New York Court of Appeals' decision in the *Penn Central* case illustrates why. That court ruled that even if regulation caused Grand Central Station itself to operate at a loss, Penn Central owned other, "heavy real estate holdings in the Grand Central area, including hotels and office buildings," and "[s]ome of this income," the court declared, "must, realistically, be imputed to the terminal" because the terminal "acts, in effect, as a magnet" and draws commerce to those more profitable enterprises. *Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 333-34 (1977). In other words, the court aggregated with Grand Central station other, "varied" business properties because they, like the station, were dedicated to the same general kind of use, i.e., commercial profit-making, and were presumed to receive an "indirect[] benefit" from their proximity to the station. *Id.* at 336. This Court, in its own decision in that case, *sub silentio* declined to travel down that narrow, winding path of reasoning, and later described the state court's approach as "an extreme—and, we think, unsupportable—view of the

relevant calculus."[5] *Lucas*, 505 U.S. at 1016 n.7. *See also* William W. Wade, Penn Central's *Economic Failings Confounded Takings Jurisprudence*, 31 Urb. Law. 277, 283 (1999) ("Judge Breitel [the author of the state court opinion] failed to recognize that the existing hotels and office buildings already laid claim to the flow of income that he arbitrarily and without legal or economic foundation chose to share with Grand Central in lieu of the income from the fifty-five-story building.").

Eminent domain law is instructive on the regulatory takings issue now before the Court because both areas of law ask a common question: what parcel (if any), other than the one directly affected by government action, must be considered along with it in order to evaluate the claim for compensation, in a fair and just way, in relation to the *whole* of the relevant property?

Because they both must answer this question, it is not enough merely to note, as the Ninth Circuit once did, that the purpose of a severance damages analysis in eminent domain law is to ascertain takings damages, whereas in a regulatory takings analysis the concern is takings liability. *See American Savings and Loan Ass'n v. County of Marin*, 653 F.2d 364, 369 (9th Cir. 1981) (rejecting use of severance damages factors to assist in identifying parcel as a whole in regulatory takings case). As the Florida Supreme Court later observed,

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[5] As the city's counsel in *Penn Central* would later relate, the city itself lost no time in informing this Court that it did not adopt the New York court's reasoning. *See* Transcript, *Looking Back on* Penn Central*: A Panel Discussion with the Supreme Court Litigators*, 15 Fordham Envtl. L. Rev. 287, 290-91 (2004).

"[t]he critical issue in the severance cases—whether allegedly discrete parcels are in fact one tract for purposes of determining a compensable taking—is identical to the issue in this [regulatory takings] case." *Dep't of Transp., Division of Admin. v. Jirik*, 498 So.2d 1253, 1255 (Fla. 1986).

The reasons put forth here as grounds for answering the Question Presented in the negative originate in *Penn Central* itself and in a body of law closely akin to regulatory takings law and employing wide-spread, well-tested principles. The Court should therefore reject the narrow, overly inclusive two-factor rule, under which "contiguousness is the key fact," as the Wisconsin Court of Appeals erroneously held. *Murr v. State of Wisconsin*, No. 2013AP2828, 2014 WL 7271581, at *4 (Wis. App. Ct. Dec. 23, 2014) (per curiam).

CONCLUSION

For the reasons stated above, the Court should hold that the categorical, two-factor rule stated in the Question Presented is not required anywhere in *Penn Central* and is inconsistent with that case. Furthermore, because the purported rule is also inconsistent with fairness and justice, the Court should decline to adopt it now.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

John Pagliaro, Staff Attorney
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111
Telephone: (617) 695-3660
johnpagliaro@nelfonline.org

April 18, 2016